SUPREME COURT, U. S.
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No. 885

In the Supreme Court of the United States

OCTOBER TERM, 1969

MARY MOYLAN, ET AL., PETITIONERS

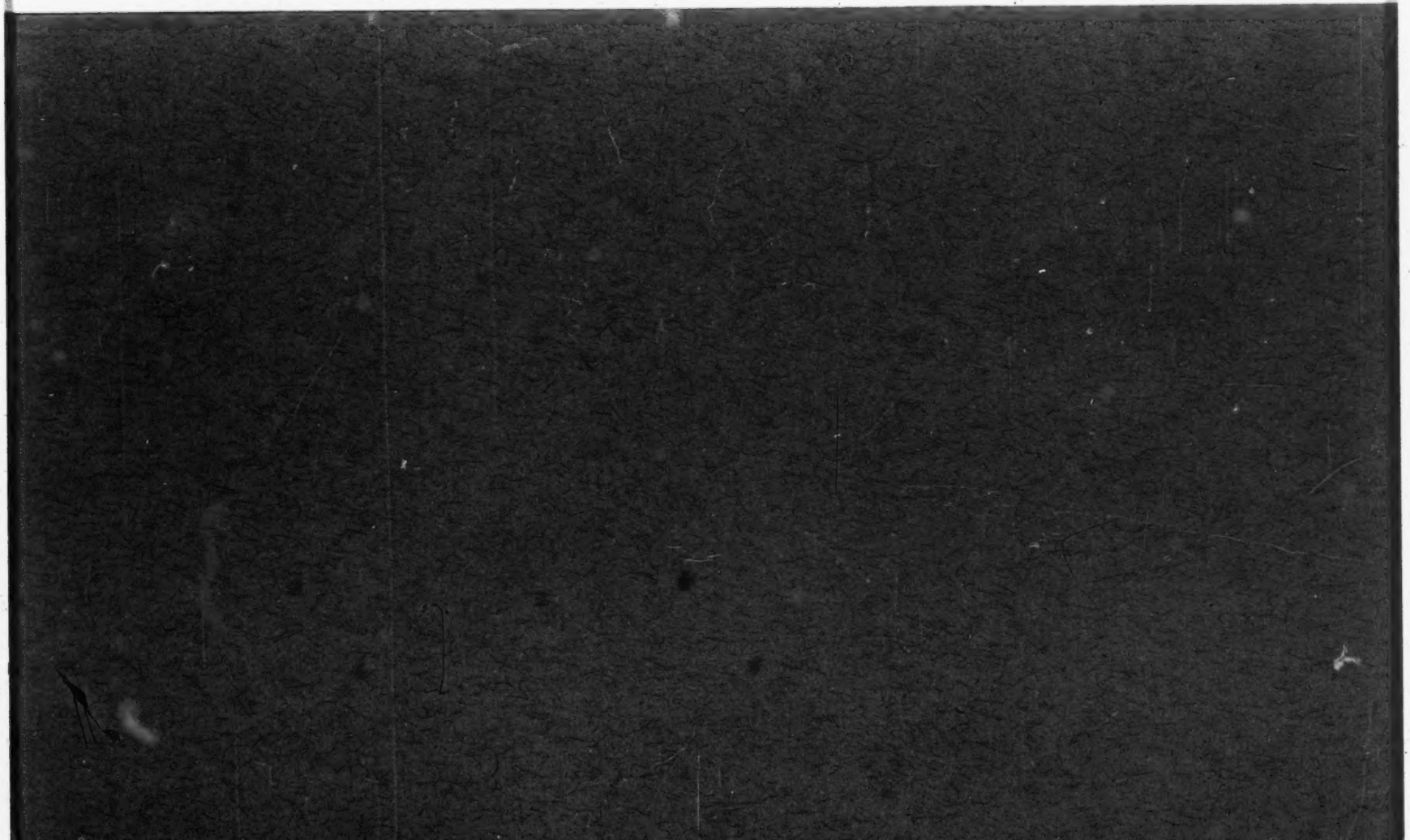
v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.



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SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted to bring to the Court's attention information relating to electronic surveillance involving the petitioner Daniel Berrigan which has been uncovered since the brief in opposition in this case was filed.

Although petitioner Berrigan was not at any time the subject of electronic surveillance directed against him, he did participate in one conversation that was overheard during the course of a surveillance, authorized by the Attorney General and involving no trespass, of premises in which the petitioner had no proprietary interest. The overheard conversation occurred in May 1966, two years before the offense of which he was convicted, and had no relation whatever to the offense.

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Petitioner Berrigan and eight other persons, his co-petitioners herein, were convicted of destroying by burning, in May 1968, more than 300 Selective Service files which they had removed for the purpose from a Catonsville, Maryland, draft board office. The evidence was undisputed. It showed, in fact, that representatives of the press had been alerted in advance that a "spectacular" and "newsworthy" event was about to take place (4 R. 237–240; 6 R. 765). As a consequence, newsmen and photographers were present at the scene to witness and record the events and a motion picture film, which was exhibited to the jury, was taken of the proceedings (4 R. 238–283). All of the defendants, testifying in their own behalf, admitted their participation in the affair (4 R. 391–392; 5 R. 462, 503–505, 517, 543, 589, 603, 622, 680–681) and it was represented to the jury by their counsel that they were proud of their accomplishment (4 R. 224).

The normal procedure which this Court has followed, when it has been advised by the Solicitor General that the government has conducted arguably illegal electronic surveillance of a convicted litigant who has standing to object to it, has been to remand the proceeding to the district court for a hearing to determine whether the interception was in fact illegal and, if so, whether the conviction was tainted thereby. *E.g., Alderman* v. *United States,* 394 U.S. 165; *Giordano* v. *United States,* 394 U.S. 310; *Mrkonjic-Ruzic* v. *United States,* 394 U.S. 454. Resolution of the latter issue, if it is reached, has involved the determination

of whether the government used the overheard conversation or conversations in "building its case against" the accused. *Alderman* v. *United States, supra,* 394 U.S. at 183. Where, however, as in this case, the offense is one which was publicly committed, in the presence of newsmen and photographers who were invited to witness and record it, and the defendants have acknowledged at trial that the objective acts charged were committed, it is suggested that the absence of any connection between the overheard conversation and the "building" of the government's case is apparent on the face of the record. If so, the normal procedure of remand, for determination of the question of legality, would seem unnecessary. If the Court agrees, it is submitted that certiorari should be denied as to petitioner Berrigan in accordance with our original submission. Otherwise, remand in accordance with the Court's usual practice in cases of this sort would appear to be indicated as to that petitioner.[1]

The petition should at all events be denied as to the other petitioners. Cf. *Giordano* v. *United States, supra,* 394 U.S. at 312.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1970.

[1] The log of the overheard conversation, consisting of 14 typewritten lines, is of course available should this Court wish to inspect it.

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